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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/736,037	12/15/2003	Carrie Melinda Kincaid	77005	4023
48940	7590	10/12/2006		
FITCH EVEN TABIN & FLANNERY 120 S. LASALLE STREET SUITE 1600 CHICAGO, IL 60603-3406			EXAMINER PADEN, CAROLYN A	
			ART UNIT 1761	PAPER NUMBER

DATE MAILED: 10/12/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/736,037	Applicant(s) KINCAID ET AL.	
	Examiner Carolyn A. Paden	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 18 April 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-33 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-33 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date <u>6-17-04 & 2-14-05</u> . | 6) <input type="checkbox"/> Other: _____ |

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 4-11, 14-18, 21, 24 & 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bower (3,366,494).

Bower discloses pressurized aerosol food emulsions. In example 1, fruit whip is made to contain water, microcrystalline cellulose, oil, emulsifier and fruit puree. In this case, microcrystalline cellulose and raspberry puree are both considered as sources of dietary fiber. The product was placed in a standard aerosol can with a propellant. The product was considered to be stable for a long period of time. The emulsifier used in the product is shown in example 1 and also at column 2, lines 32-44. The claims appear to differ from Bower in the recitation of the amount of fiber that is in the product. But to modify the extent of fiber in the Bower product would have been an obvious way to enhance the nutritive quality of fiber in a snack food. Claims 5, 6 and 18 appear to differ from Bower in the recitation of the particular emulsifier used in the composition. Column 2, lines 32-44 offers a variety of emulsifiers that may be used in the product. Diacetyl tartaric

acid esters of monoglycerides are well known in the art to be emulsifiers for use in foods. It would have been obvious to use one of a variety of known emulsifiers in the product of Bower. Claims 10, 11, 15-17, 24 and 25 are directed to the physical properties of the spread, such as density of the spread, stability and pressure in the container. No unobvious or unexpected difference is seen from the container composition of Bowers and that of the claims because the Bowers product properties would have been expected in the completed product.

Claims 2, 3, 9, 12, 13, 19, 20, 22 and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bowers as applied to claims 1, 4-8, 10, 11, 14-18, 21, 24 and 25 above, and further in view of Musser (2,883,286).

The claims appear to differ from Bowers in the recitation of the use of chocolate and dairy ingredients in the spread. Musser teaches that it is very well known in the art to incorporate cocoa, chocolate, sugar and milk into aerosol topping formulations. It would have been obvious to incorporate chocolate and dairy ingredients into the fruit whip of Bowers to provide a chocolate impact to the fruit whip.

It is finally appreciated that peanut butter is not mentioned. Peanut butter, like chocolate, is a well-known snack and dessert food. Given the variety of toppings set forth in Bowers in view of Musser, it would have been obvious to one of ordinary skill in the art to incorporate peanut butter into the fruit whip of Bowers. This would provide a new peanut butter and jelly flavor to the fruit whip.

Claims 26-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bowers in view of Musser as applied to claims 1-25 above, and further in view of Food Engineering article.

The claims appear to differ from Bowers in view of Musser in the recitation of the use of the particular container used in the product. Food Engineering teaches that aerosol containers with floating plungers are known in the art. This article also draws equivalence between the two aerosol and piston type filling containers. No unobvious or unexpected result is seen from the use of one pressurized can or the other.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached on (571) 272-1398 or by dialing 571-272-1700. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



CAROLYN PADEN 9-28-06
PRIMARY EXAMINER 1761